In the light of these authorities, it is my considered opinion that in the circumstances of this particular case the principle in *Reg* v. *Oliver* applies. The onus is not on the prosecution to prove non-existence of a licence or to adduce *prima facie* evidence of non-authorisation.

The appeal is allowed and the case will be remitted to the trial court for the respondents to be called upon to enter their defence.

*Appeal allowed.*

Solicitors: *Joseph & Son.*

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## FATIMAH v. MOIDEEN KUTTY

**[F.C. (Azmi L.P., Suffian & MacIntyre F.JJ.) December 9, 1968]**

**[Johore Bahru—Federal Court Civil Appeal No. X65 of 1967]**

*Land Laws — Land held on temporary occupation licence — Death of licensee — Claim for rent by administratrix — Whether occupier entitled to say that neither the deceased nor the administratrix had title to land at material time — Evidence Ordinance, 1950, s. 116.*

In this case the respondent occupied the land which was originally held by the husband of the appellant on a temporary occupation licence. The husband of the appellant died in 1962 and when the Collector of the Land Revenue heard of the death he refused to renew the licence after the end of 1963. The appellant as administratrix claimed rent in respect of the period July 1, 1964 to February 28, 1965. It was held in the magistrate's court and on appeal to the High Court ([1968] 1 M.L.J. 3) that she was not entitled to the rent. She appealed.

Held, dismissing the appeal: (1) whatever may have been the deceased's or the widow's right between the deceased's death and the end of 1963, thereafter as the government had refused to renew the temporary occupation licence neither his estate nor the administratrix had any right of any kind whatever to the land;

(2) section 116 of the Evidence Ordinance did not prevent the tenant from contending that neither the deceased nor the widow had any title to the land in respect of the material period, because he was not saying that the deceased or the widow had no title at the beginning of the tenancy. All he did was to contend that the deceased's title had come to an end.

*Cases referred to:—*

(1) *Papoo* v. *Veeriah* [1966] 1 M.L.J. 127.

(2) *Kumar Krishna Prosad Lal Singha Deo* v. *Baraboni Coal Concern Ltd. & Ors.* A.I.R. 1937 P.C. 251.

(3) *Rev. Luckman Chaplain* v. *Pearey Lal* A.I.R. 1939 All. 670.

The following cases were also cited in argument: *Ban Seng* v. *Yap Pek Soo* [1967] 2 M.L.J. 156, *Tay Cheo* v. *Chow Ngia* [1967] 1 M.L.J. 281, *Govindaraju* v. *Krishnan* [1962] M.L.J. 334, *Bhavan Lalu* v. *Umar Mohamed Bhaiji* A.I.R. 1927 Bombay 129, *Hee Cheng* v. *Krishnan* [1955] M.L.J. 103.

FEDERAL COURT.

*D.A. Devadason* for the appellant.

*Tara Singh Sidhu* for the respondent.

*Cur. Adv. Vult.*

**Suffian F.J.:** I have had the advantage of reading my brother MacIntyre's judgment and I too think this appeal should be dismissed.

The widow (appellant) obtained a warrant of distress in respect of rent alleged to be due for the period beginning on 1st July, 1964, and ending on 28th February, 1965. On the tenant (respondent) objecting, the learned magistrate held that she was not entitled to the rent and on appeal Ali J. agreed with the learned magistrate. With respect I also agree.

Immediately before the issue of the temporary occupation licence to the deceased, the land concerned was State land. After the issue of the temporary occupation licence, the land was still State land, but the deceased had a licence to occupy it temporarily. By law this licence was not transferable and I agree with Good J. in *Papoo* v. *Veeriah* [1] that the licence was not transmitted to the widow on the licensee's death and he died on 10th August, 1962. Thereafter the collector renewed the licence for the year 1963 in the deceased's name. When he knew of the deceased's death, he refused to renew it after the end of 1963. Whatever may have been the deceased's or the widow's right between the deceased's death and the end of 1963, thereafter because Government refused to renew the temporary occupation licence in the name of the deceased or any one else, neither his estate nor she had any right of any kind whatever to the land. Section 116 of the Evidence Ordinance, 1950 does not prevent the tenant from contending that the deceased or the widow had no title in respect of the material period beginning on 1st July, 1964, and ending on 28th February, 1965, because he was not saying that the deceased or the widow had no title at the beginning of the tenancy. All he said was that neither the deceased nor the widow had any title thereafter. Sir George Rankin when giving the advice of the Privy Council in *Kumar Krishna Prosad Lal Singha Deo* v. *Baraboni Coal Concern Ltd. & Ors.* [2] said at page 255 that section 116 of the Indian Evidence Act (which is identical with our section 116) does not "prevent a tenant from pleading that the title of the original lessor has since come to an end". And that was exactly what happened here. The tenant contended that the deceased's title had come to an end.

The facts in the instant case are almost similar to the facts in *Rev. Luckman Chaplain* v. *Pearey Lal.* [3] There a landlord sued for arrears of rent in respect of a period of four months — February to May, 1938 — for a bungalow let to the defendant. The bungalow being within a cantonment area was held on a tenure called the cantonment tenure under which the Government was authorized to resume possession of the land and also of any house

standing on it by offering proper compensation to the owner. The defendant resisted the suit on the ground that the title of the plaintiff had passed to the Government on 1st February, 1938, and hence the plaintiff had no right to any rent for the material period. The defendant also said that he had actually paid the rent for that period to the Government. On the authority of the above-cited Privy Council case, Mulla J. held that the defendant was not precluded by section 116 of the Indian Evidence Act from making the plea which rested upon facts which happened subsequent to the commencement of the tenancy.

There was some ambiguity as to the capacity in which the widow brought these proceedings. The title of the proceedings merely described her by name. In her affidavit in support of her application for distress, however, she described herself as administratrix of her husband's estate. Be that as it may, Mr. Sault who appeared for the tenant in the lower court conceded that the widow was acting in her capacity as administratrix, and the matter was disposed of on that basis. But as her husband's temporary occupation licence died with him, the temporary occupation licence land never formed part of his estate, and so as administratrix she has no standing as regards this land.

It is true, however, that the collector renewed the licence for the year 1963. But as administratrix the widow could have no say over the land — because letters of administration were not granted to her until 7th June, 1964, and by then the collector, on learning of the death of the deceased, had refused to renew the licence.

I now say a word about attornment. In the proceedings before the learned magistrate the widow claimed that after her husband's death the tenant had continued to pay rent in respect of the premises to her and the learned magistrate found as a fact that there had been an attornment by the tenant acknowledging the widow as his landlord. If this was so, it must have been an attornment as regards the widow in her personal capacity, not in her capacity as administratrix, because though her grant of letters of administration related back to her husband's death the temporary occupation licence land had ceased to form part of his property on his death. She, however, acted in the instant case in her capacity as adminstratrix and if she wishes to take advantage of the attornment to her in her personal capacity she cannot do so in these proceedings.

**Azmi L.P.** concurred.

**MacIntyre F.J.:** The appellant herein is the widow of one P. Kunjahamad bin Mammu who died intestate on August 10, 1962. He was the owner of 2 shop houses on a piece of land held by him under a temporary occupation licence situate within the Local Council area of Senggarang, Batu Pahat. The houses were rented to the respondent (hereinafter referred to as the tenant) at a rental of $40 *per mensem*. After the death of the deceased, the tenant paid the rent to the appellant (hereinafter referred to as the administratrix) at the agreed rate until July, 1964, when he commenced to remit a sum of $20 to part account of rent, and to appropriate the balance towards alleged expenses incurred in connection with the tenancy, amounting to $2,450.35. The administratrix, however, denied liability and demanded payment in full and, having failed to obtain satisfaction, refused, after the 13th of March, 1965, to accept further payments of $20 to account of rent.

The alleged expenditure incurred by the tenant included the cost of repairs to the shop houses following a notice from the Local Council to demolish them as being unfit for human occupation. He was later convicted and fined $30 by the magistrate at Batu Pahat for carrying out the aforesaid repairs without obtaining the permission of the Local Council The question of whether the amount expended on repairs is reasonable or not is not relevant for the purpose of this appeal, but, for the purpose of record, it must be mentioned that a sum of $25 out of the total expenditure was paid by the tenant towards temporary occupation licence fee for the year 1963. The licence was apparently renewed for the year 1963 in the name of the deceased. In 1964, the Collector of Land Revenue, on learning of the death of the deceased, refused to renew the licence.

On June 7, 1964, letters of administration to the estate of her late husband were granted to the administratrix by the High Court at Muar. The list of assets annexed to the petition included the two shop houses in question valued at $5,000. The grant was extracted on the 21st of February, 1965, and by an affidavit sworn on March 14, 1965, the administratrix applied to the magistrate at Batu Pahat for the issue of a warrant of distress to distrain the movable property of the tenant to recover arrears of rent amounting to $320 at the rate of $40 *per mensem* for the period commencing on July 1, 1964 and ending on February 28, 1965. A warrant was issued on March 21, and on the 24th the bailiff, accompanied by the administratrix, went to execute the warrant. What transpired at the tenant's shop appears in the report of the bailiff of the same date. He says and I quote:—

> "I waited in the shop till 12.45 p.m. but the respondent did not turn up. I was told that two or three telephone calls to Batu Pahat were put but he could not be contacted. I then made an inventory of the goods in both the shops and was about to close the shop and affix the inventory and notice on the premises when the respondent turned up. It was about 1.00 p.m. . . . The respondent said that he would pay the sum on the warrant of distress under protest as he wants to contest the suit. He then paid me $342 ($320 the amount

of claim, $12 stamp fees and $10 watchmen wages). I accepted the amount and informed the applicant of the position . . . . I then returned to Batu Pahat and deposited the amount in court. Warrant of distress not executed."

On May 29, 1965, the tenant lodged an objection against the wrongful seizure of the goods under the warrant of distress and gave notice to the administratrix to request the bailiff to release the money to him within 3 days from date thereof, failing which, to quote the notice, "you will be deemed to contest this objection and may be held liable in damages." In so far as the acceptance of the tender of $342 is concerned, the bailiff acted undoubtedly with the best of intentions but certainly in breach of the provisions of the Distress Ordinance. He had no authority under the Distress Ordinance to release goods he had seized and there can be no doubt he had effected a seizure despite his report to the contrary, as it would have been illegal for him to have taken an inventory under section 9(1) of the Distress Ordinance before seizure. According to the report, the inventory had been taken before the tender and acceptance of the rent money. Further proof of seizure is evidenced by the employment of a watchman for which the bailiff claimed and was paid $10 as wages.

The power to release goods seized under a warrant of distress is conferred exclusively upon the judge, be he a judge of the High Court or a president of the sessions court or a magistrate, as the case may be, by the provisions of sections 16 and 17 of the Ordinance. They read as follows:—

"16. The tenant may apply to a judge to discharge or suspend the execution of the warrant, or to release any part of the property seized.

17. The judge may, on any such application, deal with the matter summarily and dismiss the application or discharge the warrant, or order the release unconditionally or on such terms as he thinks fit of any property seized, or may direct an issue to be tried, and, pending the determination of such issue, suspend the execution of the warrant, or may order the property to be sold and the proceeds of sale to be lodged in court, or may make such other order on such terms as he considers fair as between the parties pending the final determination of the matter."

Section 17 makes it clear that before any property seized under a warrant of distress is released, an application must be made to a judge to discharge or suspend the execution of the warrant or to release any part of the property seized whereupon the judge is empowered to make any of the orders mentioned in the section. No such application was made in this case. The tenant, who was represented by counsel, should have applied to the magistrate for an order to discharge the warrant of distress and refund the money in court, in which event the magistrate may have ordered an issue to be tried. Instead of making such an application, the tenant filed an objection in Form 34 provided under the Subordinate Courts Rules when giving notice to an execution creditor to request the bailiff to release property attached in execution of a decree but amended to read that the administratrix should request the bailiff to release the sum of $342 paid to him. Even assuming that the administratrix was disposed to direct the bailiff to refund the money, it seems to have occurred to no one that the bailiff had no authority to make an order of payment out of money in court.

In my opinion, in releasing on his own initiative the goods seized, the bailiff had acted in excess of his powers under the Distress Ordinance; and that the tenant in applying for the refund of the money should have applied for a discharge of the warrant of distress on the ground that the distress was illegal, irregular or excessive. On the ground of these irregularities alone, the learned magistrate should have peremptorily struck out the proceedings and ordered the refund of the money to the tenant. He, however, preferred to hear the objection on its merits and made an order setting aside the application for distress without making an order discharging the warrant. The proper order should have been to discharge the warrant of distress. From that decision, the administratrix appealed to the High Court but the appeal was dismissed. She now appeals to this court.

The issue tried by the magistrate was whether the administratrix is entitled to maintain a claim for arrears of rent in respect of houses built on State land then under illegal occupation since the temporary occupation licence issued to the deceased landlord had lapsed following his death in 1962. It was orally pleaded, on behalf of the administratrix, that the tenant having accepted the administratrix as his landlord by attornment as evidenced by his letter dated February 10, 1965, was estopped from questioning her title by virtue of the provisions of section 116 of the Evidence Ordinance, 1950 which read as follows:—

"116. No tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy be permitted to deny that the landlord of such tenant had at the beginning of the tenancy a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given."

There can be no doubt that the distress proceedings in this case were brought by the appellant as administratrix of the estate of her late husband. This fact is clear not only from her statement in the affidavit in support of the application for distress but also from her evidence under cross-examination. However, it is equally clear that the shop houses which were the subject matter of the tenancy are now under illegal occupation by the tenant. In *Papoo* v. *Veeriah*,[1] Good J. held that neither the land

the subject matter of the temporary occupation licence nor anything which is attached to the land can be transferred or pass on intestacy. This is a judgment with which I respectfully agree. The law being such, it must be assumed that every contract of tenancy in respect of a house on State land contains an implied term that the tenancy is valid only for the duration of the landlord's licence to occupy the land. On the expiration of the landlord's licence either by effluxion of time or by the death of the licensee, the contract of tenancy must be deemed to have come to an end and the relationship of landlord and tenant extinguished. Therefore, once a tenancy ceases to exist the question of estoppel under section 116 of the Evidence Ordinance will not arise. It must also follow, in the circumstances of this case, that the legal representative of the estate of the deceased landlord cannot exercise the right to distrain under the Distress Ordinance since the relationship of landlord and tenancy has ceased to exist with the death of the licensee.

In the course of hearing, counsel for the administratrix confused the real issue by raising the question of attornment. The learned magistrate held that the tenant had accepted the appellant as landlord by attornment but that her act in permitting State land to be occupied was contrary to law. With respect, I do not think that the question of the legality of the contract or the application of law of estoppel arises in this case. If, however, the right to distrain for rent is based on the appellant's claim to be landlord by attornment, then she should have applied for the warrant of distress on her own right as landlord and not as administratrix of the estate of the deceased. It appears to me, therefore, that these proceedings are misconceived.

I would dismiss the appeal with costs.

*Appeal dismissed.*

Solicitors: *D.A. Devadason; Sault, Keith Seller & Co.*

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## KEPONG MINES LTD. & ANOR. v. CHEE SING KAU

**[F.C. (Azmi L.P., Suffian and MacIntyre F.JJ.) December 9, 1968]**

**[Johore Bahru—Federal Court Civil Appeal No. X19 of 1968]**

*Negligence — Highway — Accident — Employee suffering personal injuries as a result of negligence of driver of vehicle belonging to employer — Memorandum of agreement entered into under Workmen's Compensation Ordinance, 1952 — Payment of wages to employee — Whether this a bar to claim for damages under common law — Workmen's Compensation Ordinance, 1952, ss. 17 and 41.*

*Damages — Personal injuries — Jaw — Fracture — Contusion of bladder — Loss of teeth and lacerated wound.*

*Workmen's compensation — Payment of wages to employee — Whether bar to claim for damages under Workmen's Compensation Ordinance, 1952, ss. 17 and 41.*

In this case the plaintiff-respondent had suffered personal injuries as a result of the negligent driving of a driver employed by the first appellants, who were his employers. An agreement had been entered into between the first appellants and the respondent whereby a sum of $292.72 was paid to the respondent. This although described as compensation represented the wages due to him. The respondent obtained damages against the appellants in the High Court. It was argued on appeal that because of the agreement entered into under the Workmen's Compensation Ordinance, the respondent was precluded from claiming common law damages against the appellants.

**Held,** dismissing the appeal: as what the respondent in this case received under the agreement was in fact wages and not a lump sum compensation he was not precluded from claiming damages under the common law.

*Cases referred to:—*

(1) *Lind* v. *Johnson* [1937] 4 All E.R. 201.

(2) *Popple* v. *Frodingham Iron & Steel Co.* [1912] 2 K.B. 141.

The following cases were also cited in argument: *Woodcock* v. *London & North Western Railway Co.* [1913] 3 K.B. 139, *Kahu Illias* v. *N.V. Vereenigde Nederlandsche Scheepvaartmaatschappij* [1961] M.L.J. 275, *Lind* v. *Johnson* [1937] 4 All E.R. 201, *Chua Kim Liang & Anor.* v. *Teo Kim Ngo* [1963] M.L.J. 262, *Liow Sang* v. *Chai Choo Kim & Anor.* [1962] M.L.J. 429 and *Ghulam Hussain* v. *Shaharom & Anor.* [1966] 2 M.L.J. 207.

FEDERAL COURT.

*C.S. Wu* for the appellants.

*D.H. Murphy* for the respondent.

*Cur. Adv. Vult.*

**Azmi L.P.:** The appellants were defendants in the suit and the respondent was the plaintiff. On 5th January 1962, the plaintiff suffered personal injuries as a result of the negligent driving of the second defendant and he was awarded by the High Court $10,000 general damages for a fracture of the mandible, contusion of bladder with rupture of the tip of the urethera, loss of 2 molar teeth and lacerated wound on the left thigh. The learned judge, however, dismissed plaintiff's claim for damages for alleged impotency resulting from the accident. The respondent cross appealed against this finding.

The first defendant, a mining company, was sued as the employer of the second defendant. Both defendants admitted negligence but alleged that on 5th November 1963, the plaintiff had entered into a memorandum of agreement with the first defendant in compliance with section 28 of the Workmen's Compensation Ordinance 1952, hereinafter referred to as the Ordinance, whereby the first defendant paid to the plaintiff a sum of $292.72 by way of agreed compensation under the Ordinance. He further said that the memorandum of agreement was duly registered by the Commissioner of Workmen's Compensation on